

5830
1 Mar 16

From: CAPT Daniel E. Eldredge, JAGC, USN
To: Chief of Naval Operations

Subj: PRELIMINARY INQUIRY INTO ALLEGED JOINT ETHICS REGULATION (JER)
VIOLATIONS BY CDR WILLIAM MARKS, USN

Ref: (a) JAGMAN, Section 0203
(b) DoD 5500.7-R (JER)
(c) 5 CFR 2635.807
(d) SECNAVINST 5720.44C (DoN Public Affairs Policy and Regulations) 21 Feb 12
(e) OGE DAEOGram 08-006a of 6 Mar 08
(f) Kickstarter FAQs <https://www.kickstarter.com/help/faq/kickstarter+basics?ref=footer>
(g) www.williammarks.com

Encl: (1) CNO ltr 5830 Ser DNS 18 Feb 16
(2) CDR William Marks' "Truth or Dare" *Kickstarter* screen captures.
(3) CDR Marks Voluntary Statement of 26 Feb 16

1. Introduction:

I conducted this preliminary inquiry in accordance with reference (a) into alleged JER violations by CDR William Marks, USN. During the course of my investigation, I obtained enough evidence to suspect CDR Marks of violating reference (b), the JER. Section 10-100 of the JER states that violation of the JER (and the rules republished in it and prescribed by it, including reference (c)) is punishable under the UCMJ. I also suspected CDR Marks of violating the commercial publication and commercial speaking rules of reference (d), DoN Public Affairs Policy, section 0218. That section is explicit, clear, and uses the term "shall" when listing rules for writing and speaking. The reference was issued by the Secretary of the Navy (SECNAV) and it is my opinion that it is a general order enforceable under Article 92 of the UCMJ. Even if not enforceable as a general order, it sets and requires a standard that CDR Marks did not meet and that caused me to suspect CDR Marks of dereliction of duty under Article 92 of the UCMJ. CDR Marks' conduct could also potentially be viewed as conduct unbecoming under Article 133.

Therefore, before attempting to interview CDR Marks on 24 February 2016 at 1000, I provided him a rights warning under Article 31b of the UCMJ, as required by reference (a), section 0210d(1), using the form referenced by JAGMAN section 0170. CDR Marks chose to invoke his right to remain silent so I terminated the interview. I did not require him to sign the form so I did not attach it as an enclosure, but I have it in case it is needed. The only question I asked CDR Marks during our meeting was whether he understood his rights and he informed me that he did so. I note that he appeared nervous, anxious, distraught,¹ and eager to talk. He

¹ I passed my concern concerning his well-being to this inquiry's legal POC and he informed me that CDR Marks was informed of personal support resources.

Subj: PRELIMINARY INQUIRY INTO ALLEGED JOINT ETHICS REGULATION (JER)
VIOLATIONS BY CDR WILLIAM MARKS, USN

offered, unsolicited, that an attorney informed him that the attorney knew of no case when "things went better" for an accused after talking compared to if the accused never spoke at all. Also, when I was informing him that I suspected him of violating rules associated with disclaimers, he blurted out that his Kickstarter page had a disclaimer. I have been unable to find that disclaimer on the website. Please see the facts section below for why I did not see the disclaimer. Before choosing to invoke his rights, CDR Marks asked me if he could see what I had looked at on the internet. I said, "sure," and permitted him to view enclosure (2). Unsolicited, he confirmed that it was his site.

On 26 February, CDR Marks wrote me via e-mail and asked if he could turn in a voluntary statement by COB that day. I responded that he could and later that day he provided enclosure (3) via e-mail. In order to incorporate his statement into this inquiry, I obtained an extension to 1 March to submit my report.

For Preliminary Inquiries, JAGMAN section 0204b lists command options, two of which are applicable to this inquiry: (1) take no action or (2) convene a command investigation. In this case, my opinion is that option (1) is not warranted and option (2) is not required. I am confident that this inquiry has discovered enough evidence for the command to make a disposition decision and that a command investigation will not uncover significant additional evidence that would narrow or widen command options.

2. Personnel contacted: CDR William Marks, USN, and enclosure (1)'s legal POC, Obert, JAGC, USN.

(b)(6)

3. Materials reviewed: References (a) through (g) and enclosures (1) through (3). Please note that enclosure (2), the screen captures, are easiest read on a computer screen using the zoom function.

4. Summary of findings:

CDR Marks started a Kickstarter campaign on 13 February 2016, titled "Truth or Dare: Confessions of a Military Spokesman" to raise funds to self-publish a book (see enclosure (2)) and then he shut it down on 16 February 2016. He did so after discussions with friends and peers but has kept the site visible so that it could be viewed by investigators. He is standing by to cancel the account. His posting appears to be based on a spur of the moment decision as a way to gain feedback to determine whether his project was worth completing. He did not receive any compensation because Kickstarter is all or nothing. From reference (f), Kickstarter FAQs:

Funding on Kickstarter is all-or-nothing. No one will be charged for a pledge towards a project unless it reaches its funding goal. This way, creators always have the budget they scoped out before moving forward.

CDR Marks' opening screen on Kickstarter contains his picture and the words, "I am a spokesperson for the U.S. Navy" and includes a blurred picture of him in uniform holding a microphone towards the viewer. No disclaimer is on the screen. CDR Marks states that he included a disclaimer in an FAQ section but that section cannot be accessed when a project is

Subj: PRELIMINARY INQUIRY INTO ALLEGED JOINT ETHICS REGULATION (JER)
VIOLATIONS BY CDR WILLIAM MARKS, USN

cancelled, and even if not cancelled, to access the FAQs, one must click on an FAQ tab. In other words, the disclaimer is not visible on the main page that contains CDR Marks' photo and proclamation. His Kickstarter posting claims "it's rare to hear the true stories of what goes on . . . within military public affairs." He tells potential backers that he will explain the "tricks" to get communications points across. He provides a few snippets of his project including a teaser on how Mario Andretti almost got him fired and he reveals a humorous exchange between him and Mr. Wolf Blitzer relating to early morning wake-up calls. CDR Marks specifically references a crisis in China or Iran as challenges that may draw him away from his project.

CDR Marks, in the "rewards" section of the site, attempted to sell access to himself and answer questions about the Navy, with greater levels of access (such as Skype, face-to-face) available to those backers who commit more money. From the website:

Pledge \$5 or more (0 backers): You will get a code for a digital download of the book.

Pledge \$10 or more (2 backers): You will get your book in the very first shipment.

Pledge \$20 or more (12 backers): You will get an autographed copy of the book, sent in the very first shipment.

Pledge \$50 or more (4 backers): If you are outside Washington DC area I'll reserve time to chat by phone, skype or messenger after sending your copy of the book. You can ask questions about my military career, life at the pentagon or in Japan, or anything else that interests you.

Pledge \$100 or more (0 backers): If you are in the Washington DC area I will meet you for lunch to deliver your autographed copy of the book. You can ask questions about my military career, life at the pentagon or in Japan, or anything else that interests you.

18 backers had provided \$588 dollars towards the \$5,000 funding goal when the site was shut down.

A link on CDR Marks' Kickstarter site took me to reference (g), a personal website that appears to be maintained by CDR Marks. I could not access it via NMCI so I did not include screen shots as an enclosure. It contains the same photo that is at the top of the Kickstarter site and is a conglomeration of Navy Public Affairs issues associated with CDR Marks' involvement. It contains prominent icons of "FOX" and "CNN." I cannot tell whether any of the photos or materials posted or linked to the website are official Navy photos. I did not see a disclaimer.

Enclosure (3) is CDR Marks' voluntary statement. He leads his statement with the following:

First and foremost I would like to apologize to Rear Adm. Cutler and the team at CHINFO for the distraction from our mission and uncertainly [sic] and confusion my post caused. I am charged to lead, guide and mentor a terrific group of junior officers and I failed to lead by example. The past two weeks have been especially difficult for me

Subj: PRELIMINARY INQUIRY INTO ALLEGED JOINT ETHICS REGULATION (JER) VIOLATIONS BY CDR WILLIAM MARKS, USN

because I know the people at CHINFO have had to wake up earlier, work later, answer more calls and cover the areas where I was absent, I owe them better.

I also regret that my actions have caused embarrassment to the public affairs community as a whole, causing leaders and the press to question the judgment of the PAOs they entrust to make smart decisions. We as PAOs are expected to be smarter than what my actions showed because for us it's not just about the letter of the law, it's also about trust and relationships.

In his statement, he references what appears to be an initial attempt to vet his proposed book:

In 2013 I submitted my book idea to NAVINFO East per instruction and they assigned me project number 13-F29. At that time I also added disclaimers on all my notes as recommended by NAVINFO East.

I did not locate an instruction addressing this issue. Reference (d), section 0104, paragraph 5.b.3 states: "NAVINFO East serves as a Navy contact for book authors requesting Navy support." The quoted section appears to be focused on authors external to the Navy, but CDR Marks may have been using this mechanism as an inject point to attempt to receive Navy support for his own book about the Navy. A request to NAVINFO East does not substitute for the JER or security disclosure guidance. I infer that NAVINFO East, in 2013, did not review and approve a proposed Kickstarter posting years in advance, particularly since CDR Marks states that his posting was "spur-of-the-moment." In his statement, CDR Marks says "I believed I was complying with [ethics instructions] when I initiated this idea."

CDR Marks ends his statement with:

I accept full responsibility for causing this misunderstanding. Whether perceptions are accurate or not, this was a careless use of social media. I now fully understand the scope, letter, and spirit of the ethics instructions as they relate to personal writings concerning my time in the military, even though I believed I was complying with them when I initiated this idea.

I understand why this was a lapse in judgment and want to sincerely apologize to my shipmates and Navy leadership for this temporary but significant error. I am fortunate that I was able to cancel the project so soon after it posted, but the perception of poor judgment will persist and I hold myself accountable for that. The bottom line is what I post online, even for personal projects, has bigger repercussions than just myself. I should have thought of others first and for that failure I am sorry.

I value my career, my service to our country, and the role I play as PAO and Naval Officer. I hope to continue in my career and serve my country for many more years. This mistake will not happen again and I will use it tool to mentor others in the future.

5. *Legal, Ethics, and Unsatisfactory Performance of Duty Issues.*

- Attempt to receive compensation for speaking and writing. Pursuant to 5 CFR §2635.807, an employee shall not receive compensation from any source other than the Government for speaking or writing that relates to the employee's official duties. The rules on

Subj: PRELIMINARY INQUIRY INTO ALLEGED JOINT ETHICS REGULATION (JER)
VIOLATIONS BY CDR WILLIAM MARKS, USN

book publishing apply to CDR Marks because he is a regular government employee within the meaning of references (b), (c), and (e). Additionally, his Kickstarter site reflects that his writing is related to official duties. There are two tests to determine if the writing is related to official duties (5 CFR § 2635.807(a)(2)(i)(E)(1) & (2)) and my opinion is that he meets both tests because his reference to the Pentagon relate to duties to which he was assigned in the last year and his other references relate to ongoing policies, programs, and operations of the Navy. I am not providing a detailed legal analysis here; the footnotes on page 4 of reference (e) reflect that the official duty tests cover a broad range of activities. As just one example, his Kickstarter site links to a Mr. Blitzer tweet discussion ship movement information provided to him by CDR Marks when CDR Marks was serving at C7F.

Although CDR Marks shut down his site before receiving compensation, my opinion is that he attempted to violate the writing (book) and speaking (backers pay more to meet with him and to ask questions about the Navy) rules. Ignorance of the JER is no excuse and these prohibitions are also referenced clearly in section 0218 of reference (d), the overarching SECNAVINST that contains public affairs guidance and regulations. That instruction devotes an entire page to commercial publication and speaking, references the JER, and requires the author to submit the material for a security and policy review. I have no evidence that CDR Marks did so before soliciting his writing and a reasonable inference is that he did not do so. He says provided "notes" to NAVINFO East in 2013, but his Kickstarter posting states that he has "about 100 pages" written.

- Disclaimers. The Public Affairs Guidance contained in reference (d) is explicit, as is the JER which it references, regarding disclaimers:

A DoD employee who uses or permits the use of their military grade or who includes or permits the inclusion of their title or position as one of several biographical details given to identify himself in connection with teaching, speaking or writing, per DoD 5500.07-R of 1 August 1993, section 2-207, shall make a disclaimer if the subject of the teaching, speaking or writing deals in significant part with any ongoing or announced policy, program or operation of the DoD employee's agency and the DoD employee has not been authorized by appropriate agency authority to present that material as the agency's position. The disclaimer shall be made as follows:

- (1) The required disclaimer shall expressly state that the views presented are those of the speaker or author and do not necessarily represent the views of DoD or its components.
- (2) Where a disclaimer is required for an article, book or other writing, the disclaimer shall be printed in a reasonably prominent position in the writing itself.

On the Kickstarter site, CDR Marks uses his military grade and his position -- "Chief of Media Operations at the Navy's Office of Information (CHINFO)" -- in connection with his writing. As the SECNAVINST section quoted above references, a disclaimer is required by the JER (the SECNAVINST mirrors the JER requirement). Also, his photo and opening statement claiming to be a spokesperson for the Navy contains no disclaimer. I accept CDR Mark's word that he had a disclaimer in his FAQs. My opinion is that a disclaimer located in a separate link that is

Subj: PRELIMINARY INQUIRY INTO ALLEGED JOINT ETHICS REGULATION (JER)
VIOLATIONS BY CDR WILLIAM MARKS, USN

not entitled "disclaimer" is not "reasonably prominent" and therefore CDR Marks' posting violates the JER and the SECNAVINST.

- Impartiality/Conflict of Interest. As explained in reference (e), when an employee enters into a book deal that complies with all other ethics provisions, the employee will have to be recused from government matters involving the book publisher in order to avoid the appearance of loss of impartiality. Typically, this requirement is triggered when an employee has a book contract and then may be involved in a matter involving that same publisher. Self-publishing guidance is not explicitly covered in the ethics guidance. If the Kickstarter backers are viewed as publishers, then CDR Marks is attempting to enter into a business relationship with members of the public, the same members that he represents the Navy to. As a result, his credibility could be called into question. As section 0101 of reference (d), the SECNAVINST, states, "PA principles include accountability to the public, full disclosure, expeditious release of information, alignment, and professional ethics." I have not determined with confidence that CDR Marks faces an actual conflict of interest, but his credibility and that of Navy Public Affairs has been called into question. In future public and media interactions will CDR Marks be telling the Navy's story, or looking for opportunities to bolster his own story and his book sales? Will he pull training opportunities from junior officers to appear before the public or press when taking the limelight himself could add material to his "confessions"?

- Unsatisfactory Performance of Duty. I note here that it is troubling that CDR Marks would attempt to sell information that it is, essentially, a mission of the Navy Public Affairs community to provide to the public for free. Public Affairs policy and regulations, reference (d), includes this mandate in the very first paragraph: "In the U.S., public servants are obliged to inform the citizens about the full scope of governmental activity, consistent with national security and privacy concerns."

Section 0102, paragraph 2, of the policy and regulations sets a high bar:

All DON PA/VI professionals are members of the organizational function that communicates for the department. This is true regardless of whether they are in a billet with the duty to release information directly to the public or the media. It also applies when they are not in uniform and not "on the job." Statements made about military and political issues, including those expressed on personal social media accounts, could be perceived as the official views of the government. This may undermine the credibility of the DON and the effectiveness of the individual to serve as a communicator for the department. While this does not abridge their individual rights under the First Amendment, DON PA/VI personnel must maintain their value to the organization by observing a higher standard of discretion than typically expected of federal civilian employees and military personnel. DON PA/VI personnel must remain impartial and even disinterested in the development of social, political, and cultural issues. DON PA/VI professionals should always regard themselves as representatives of the department.

For a senior officer, working in the Pentagon, and running media issues, the lines are blurred, if not eliminated, between the officer's professional and private life. In this case, CDR Marks did not even attempt to draw a distinction between his official and his private views on the

Subj: PRELIMINARY INQUIRY INTO ALLEGED JOINT ETHICS REGULATION (JER)
VIOLATIONS BY CDR WILLIAM MARKS, USN

Kickstarter site, but for a non-prominent FAQ disclaimer in the latter. CDR Marks appeared in uniform, announced his title, and claimed to be a spokesman for the Navy, all while attempting to raise money and selling access to complete strangers to describe the operations of the Navy in both Japan and the Pentagon over lunch for a hundred dollars. He claims in his statement that his book notes are "are all generic information that can be found online or in leadership and communication books." But his Kickstarter site promises the "true stories" of what goes on in Navy Public Affairs. This assertion combined with the poor word-choice intent to share communication "tricks." Perhaps this is why CDR Marks recognizes in his statement that the Kickstarter posting has caused embarrassment to Navy Public Affairs.

The higher standard of discretion required in guidance are also embodied in the ethical canon for public affairs, included by SECNAV in reference (d). The loyalty principal, on point here, requires "loyalty to the institution first." Like the U.S. Navy Ethos that states "We are a team . . .," the canon recognizes that it is about the Navy and not about the individual. CDR Marks recognizes this. In his statement, he writes, "The bottom line is what I post online, even for personal projects, has bigger repercussions than just myself. I should have thought of others first and for that failure I am sorry."

6. Recommendation:

Issue a Letter of Instruction (LOI) to CDR Marks. I considered recommending non-judicial punishment (NJP) and this option is certainly a viable disposition choice. The Navy is not a zero tolerance organization, but good order and discipline requires that first offenses sometimes be disposed of at NJP or higher. While CDR Marks postings are self-serving and tend to paint the Navy in a negative light, and while he should have known better as a senior officer with nearly twenty years of commissioned service, he understands the gravity and consequences of his actions and has apologized for his conduct. I also note that that publishing rules are some of the most complicated under the ethics regulations. For "regular" employees alone, reference (e) is twenty-four pages, single spaced. Its counterpart for non-regular employees is twenty-nine pages. This does not excuse CDR Marks' conduct by any means because he did not avail himself of experts who could advise him ahead of time as required by the JER and the SECNAVINST. My professional opinion is that the negative consequences of his actions can be mitigated, if not corrected, by removing his sites from public view (that direction should be included in the LOI), through training, and through a requirement that CDR Marks obtain a formal (written) legal review prior to any attempt to be compensated for writing or speaking in his personal capacity. His required performance standard should be included in the LOI with a specific reference to the public affairs ethical canon. His performance and media interactions should be monitored closely to determine whether, over time, he has internalized the canons and regained the trust of leadership.

(b)(6)

D. E. ELDREDGE